No. 2842

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IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

HARRY CANNON and WALTER D. STOREY,
Respondents.

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

In this case there are two questions presented by the brief of the counsel for the appellant. The first is whether the appellee Cannon perpetrated a fraud upon the government in his entry, final proof and acquirement of title to the land involved in this cause. The second is whether the appellee Walter D. Storey was an

innocent purchaser for a valuable consideration.

Counsel for the government admit in the beginning of their argument that the findings of the trial court on the questions of fact will not be disturbed on appeal unless the proof submitted greatly preponderates against the findings made. In this case the lower court held that the allegations of fraud in the complaint were not proven and the allegations of new matter in the answer were proven. Federal courts have held without exception, that:

> "The legal presumption is that the finding and decree of a court of chancery are right, and they should not be disturbed or modified by an appellate court, unless an obvious error has intervened in the application of the law or some grave mistake has been made in the consideration of the facts."
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> Furrer vs. Faris, 145 U. S. 132.
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> Kimberly vs. Arms, 129 U. S. 512.
>
> Tilghman vs. Procter, 125 U. S. 136.
>
> Stearns-Rodgers Mfg. Co., vs. Brown, 114 Fed. 939.
>
> Manhattan Life Ins. Co., vs. Wright, 126 Fed. 82.

It is also a well established rule of law that:

> "In such a case, the respect due to a patent, the presumption that all the pre-

ceding steps required by the law have been observed before its issue, and the immense importance of stability of titles dependent upon these instruments, demand that suit to cancel them should be sustained only by proof which produces conviction."

Wright-Blodgett Co., vs. U. S., 35 Sup. Ct. Rep. 339.

Colorado Coal & Iron Co., vs. U. S. 31 L. Ed. 182.

U. S. vs. Maxwell Land Grant Co., 30 L. Ed. 949.

I.

Does the evidence in this case so strongly preponderate against the appellees that it produces a conviction that the acts of Cannon in entering, submitting final proof, and securing title to the land in question were done with an intent to defraud the government and to overthrow the presumption that the findings of the district court were correct? It is contended by counsel for the government that the entry was fraudulent and void in its inception, presumably on the ground that the entry was made for the benefit of the appellee Storey. This contention is based on the following grounds:

1. That prior to 1909 Cannon had been in the employ of Storey;

2. That prior to 1909 Storey had made homestead entry on this tract of land;

3. That as soon as Storey relinquished to the government Cannon filed thereon;

4. That after issuance of patent Cannon sold the land to Storey.

On these points there is no dispute in the evidence. Both Cannon and Storey admit the truth thereof, but we submit that these facts alone absolutely fail to prove any understanding or agreement between Cannon and Storey as to the future disposition of the land, entered into before the issuance of the patent to Cannon. Admit, if we will, that the facts relied upon by the government might give rise to a suspicion of fraud, it must still be admitted that they are just as consistent with an entire honesty of purpose. Not only did the government fail to prove the existence of any agreement or contract between the appellees, but the uncontradicted testimony in the case conclusively proves that there were none. No witness testified to the existence of such an agreement; while Mr. Cannon and Mr. Storey both deny that any such agreement was ever made or contemplated (Tr. p. 91). Aside from this testimony, we believe that the facts developed in the case are utterly irreconcilable with the theory of the government on this point. The most significant of these facts is that while Mr.

Cannon made proof on his claim in January, 1911, and received patent therefor in June, 1911 (Tr. p. 73), he did not sell this land to Mr. Storey until in April, 1912 (Tr. pp. 62, 74, 91). The sale and transfer were made fifteen months after Mr. Cannon submitted his final proof, and nearly a year after patent for the land was issued to him. As Cannon states, he never thought of leaving or disposing of his homestead until early in April, 1912, he received what he deemed to be an advantageous offer of employment in the State of Washington (Tr. p. 62).

After Cannon made his final proof he still continued to make his home at the claim, and in the latter part of 1911, or early in 1912, nearly a year after he made final proof, he constructed a barn on the homestead, which he paid for and built himself (Tr. pp. 61, 64, 72, 77, 86). These facts are undenied and uncontradicted by any evidence in the case, and we contend, are absolutely inconsistent and irreconcilable with the theory of the government on this point.

Counsel, in their brief, have seen fit to enter into a rather extended discussion of the practices of "unscrupulous land grabbers" and large "land holders" in an apparent endeavor to put the present controversy on a plane where it most manifestly does not belong. The land

covered by the entry of Mr. Cannon consists of one hundred sixty acres of arid prairie. No witness testified that it was worth in excess of the sum of one thousand dollars paid by Mr. Storey. There is nothing in the case to indicate that either Mr. Cannon or Mr. Storey are unscrupulous land grabbers or large land holders, and nothing to call for the oratorical flight upon this point of counsel for the government. It is true that a bureau of investigation has grown up in the department of the interior, the "sole duty of which is to see that the donor of our virgin soil is not defrauded." and the result has been that some of the agents of this bureau, feeling that it was incumbent upon them to produce some results from their investigations, and thus, at least in appearance, justify their continuance upon the government pay roll, have in many instances, in this locality at least, instigated the commencement of actions such as this, where the case of the government was glaringly devoid of any proof beyond the suspicions of its witnesses.

II.

There can be no doubt from the testimony as a whole that when Mr. Cannon made entry on this homestead he at once proceeded to put the house in a condition fit for habitation: that he fenced the land and rebuilt the barn there-

on. The only witness for the government who testified to being in the cabin between May 1, 1909, and January 21, 1911, was Robin Harrison, who admitted that the house was fairly well furnished. Mr. Cannon himself testified that he had a suitable outfit there for keeping house: "I had three stoves, a heating stove, and I had a good bed, springs and mattress and a good cover. I had a table, dishes, cooking utensils, my clothing and what stuff I have." (Tr. p. 58.) The testimony of Mr. Cannon on this point is amply corrobrated by that of A. E. Buster at pages 75-77 of the transcript, and Chester A. Roberts at pages 81-83 of the transcript.

The value of the improvements on this claim at the time of final proof is placed at from three or four hundred dollars to one thousand dollars. Mr. Cannon himself fixed the value of the improvements made by him at about $300.00 (Tr. p. 64). No witness for the government testified as to the value of these improvements. Therefore, we assume that there can be no question that the fraudulent acts of defendant Cannon could not consist in the failure to make the improvements required by law.

The testimony is undisputed that Mr. Cannon secured the cultivation of about ten acres of his land by Mr. Storey in exchange for the

crop raised thereon (Tr. p. 58). It is not contended by counsel for the government that this cultivation did not comply with the requirements of the law and the rules of the department with reference thereto.

III.

This leaves only one question to be considered; that is, whether or not Mr. Cannon complied with the law of the United States and the rules of the department of the interior with reference to residence upon his claim. It is upon this point that counsel for the government lay the greatest stress in their brief.

In considering the argument of counsel for the government upon this point, and a review of the evidence thereon, it is very apparent that counsel have completely misinterpreted and distorted the effect of a great deal of the testimony. Mr. Imhoff was not employed by Mr. Storey from March 1, 1909, until January, 1911, as stated in brief of appellant. Imhoff did state that **between** those dates he was employed by Mr. Storey. At page 32 of the transcript his testimony appears that: "I commenced working for Mr. Storey in October, 1908, and worked for him until June, 1909." Mr. Cannon made his entry May 1, 1909. Therefore, Imhoff only worked for Mr. Storey one month after Cannon made his entry. It

is true that he testified that in the year 1908 the door of the cabin on the land was open, the cabin was in poor condition and cattle had been in there; but in the year 1908 Cannon had not made his entry and certainly the condition of the cabin before the entry was made would be of no importance in this hearing. Mr. Imhoff does testify at page 34 of the transcript that after May, 1909, the door was not open and shutters on hinges had been put on the windows. He never happened to see Mr. Cannon on the land in question, but, as he admits, he "did not pay much attention to it." At page 36 of the transcript he states that he saw Mr. Cannon building a barn on the premises and further states at page 37, "So far as I know, he might have resided on his homestead, taken his meals there, and slept there and made it his home to the exclusion of one elsewhere."

While Mr. Harrison testified that he passed the claim two or three times a week during the period from May 1, 1909, to January, 1911, and never saw Mr. Cannon there, at page 40 of the transcript he says: "I never investigated the house. So far as I know, it might have been furnished, might have been plumb full. At any time I passed by there Mr. Cannon might have been in the house. I would not say he was not. I never inquired or looked in there to see."

Miss Robbin Harrison was the next witness for the government. At the time of the trial in 1916 she was 17 years old. In the years 1909 and 1910, the period involved in this controversy, she was a child of ten or eleven years of age. She testified that she went by the cabin on her way to and from school and never saw anyone around there, except once, when she saw Mr. Cannon building a barn. At one time, which she was unable to fix, she looked in the cabin and "saw a table in there and a stove and a bed. There was some dishes in the cabin, enough, I guess, for one person to use." (Tr. pp. 43-44.) This witness did not pretend to say that Mr. Cannon actually did not reside on this claim or that he had any home elsewhere.

The next witness, Mrs. Maud Kirk, at page 47 of the transcript, testified: "From the 21st of January, 1911, until May I was there nearly every day and that is the time when Mr. Cannon was living in the room in the trotting barn. Prior to that time I could not swear that he slept there all the time." Of course Cannon submitted his final proof in January, 1911; so whether or not he stayed in the barn or Storey's place after he had submitted proof is immaterial. At page 48 of the transcript she testified: "I don't know but what some other person working for Mr. Storey occupied

this bed in the trotting barn." The witness concluded her testimony on page 48 of the transcript with the statement: "I am just giving you what I think, what I suppose, not what I know." The truth of this last statement by the witness is apparent when her whole testimony is read. She based practically every statement made therein on what she supposed or thought, not upon what she knew. As a matter of fact, she did not know where Mr. Cannon was staying.

Mr. Kirk, at page 53 of the transcript, said: "I said that Mr. Cannon roomed in this trotting barn, but did not see him sleep there. * * * I was never up to his cabin during the night time, and do not know whether he ever slept in the cabin or not. I don't know where he slept a single night from May 1, 1909, to January 24, 1911."

Mrs. Harrison and Mr. Loeffler both testified that while they had been by the cabin on the Cannon entry at various times, they never saw anything to indicate that anyone was living there. Neither one of them testified that they had ever been up to the cabin or pretended to know where Mr. Cannon did live.

Certain of the above witnesses testified that Mr. Cannon ate a good many of his meals at the Storey place during the period from May, 1909, to January, 1911, and that he worked

around the horses on the Storey place and had a trunk in the Storey barn. These facts are not disputed by the witnesses for the appellees. Many of the witnesses stated that Mr. Cannon was in the employ of Mr. Storey, taking care of his horses. The evidence conclusively shows, however, that Mr. Cannon was in the horse business, training horses for any person who wished to employ him; that he rented the Storey barn for an agreed consideration; and that during the period from 1909 to 1911 he handled the horses of many different owners. During that time he handled some horses for Mr. Storey upon the same basis and for the same consideration that he handled other people's horses (Tr. pp. 58, 59, 88). Many of the witnesses referred to a trunk of Mr. Cannon's which was kept in the "trotting room" of Mr. Storey's barn. All of them referred to it as Mr. Cannon's trunk, and assumed that it contained all of his personal belongings. None of them, however, testified as to the actual contents. Mr. Cannon, himself, Mr. Storey, and other witnesses for the defense testified that this trunk contained the equipment and tools necessary for the care and training of the horses that Mr. Cannon was handling. And Mr. Cannon further testified that it did not contain any of his clothes or personal belongings at all (Tr. pp. 67, 94).

We believe that if this court were to consider nothing but the evidence of witnesses for the government that it would be obliged to find that the government had absolutely failed to make out a case. But when the court goes further, and considers the testimony given by the witnesses for the defense, certainly the least that it can say is that there is no preponderance against the testimony submitted by the defendants, and that therefore the findings of the trial court should not be disturbed on this appeal. It is true that Cannon's work took him away from his claim during most of the day, but as testified by witnesses for the defense, his claim was on dry land. At that time, in 1909 and 1910, no person thought that this dry land could be profitably cultivated, and about the only use to which it could be put was for stock or sheep raising. Mr. Cannon testified that he wished to acquire title to the land to use the same for stock raising purposes. He could not make a living from the land, and therefore was justified in seeking such employment and occupation as would insure a living for him. He did spend several hundred dollars improving the claim and continued to make the claim his home from May, 1909, until long after he had submitted final proof and received patent therefor.

We therefore contend that the record in this

case affirmatively shows that Mr. Cannon substantially complied with every requirement of the law and the department of the interior; that he was entitled to patent upon the place; and that no fraud was practiced by him in entering, making final proof or acquiring title to the land involved.

IV.

We believe that the evidence in the case conclusively establishes that Cannon acted in entire good faith in making his entry, submitting final proof and acquiring title to the land in question.

If, however, this court were to find that Cannon was guilty of fraudulent conduct in any particular, the question would then arise as to whether Storey took any part therein, or whether he was an innocent purchaser, for value. It is not denied by the government that Storey paid a valuable consideration when he acquired title to this land from Cannon. There is absolutely no evidence of any unlawful agreement between Cannon and Storey before Cannon received the patent for this land. Storey states, without contradiction, that there was no such contract. He also states that while he did not know where Mr. Cannon was sleeping between May 1, 1909, and January 24, 1911, he did know that he did not sleep at his,

Story's place. At pages 92 and 93 of the transcript he testifies: "I did not have any knowledge during the time intervening between May 1, 1909, and January 24, 1911, that Mr. Cannon was making his home anywhere else excepting on his homestead. * * * So far as I know, his residenc on that land was as continuous as the residence of the ordinary homesteader on his homestead."

This testimony of Mr. Storey's is not contradicted by any evidence in the case, and we therefore submit that the finding of the trial court that the defendants had proven the allegations of new matter set up in the answer is fully sustained by the evidence.

We therefore respectfully contend, that the government absolutely failed to make out a prima facie case of fraud, as against the defendant Cannon; that the defendant Storey conclusively proved that he was a bona fide purchaser for value, of the land involved herein; and that therefore, the findings and judgment of the trial court herein should be sustained.

Respectfully submitted,

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